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9 Attorneys for Defendant  
WELLS FARGO BANK, N.A., erroneously sued  
10 as Wells Fargo Home Mortgage

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION**

14 J. CHRIS WALSH, an individual, and  
15 J. CHRIS WALSH, Trustee of The JCW Separate Property Trust Dated 7/28/03.

16 || Plaintiffs.

17 || v.

18 WELLS FARGO HOME MORTGAGE,  
19 a division of Wells Fargo Bank, N.A., a  
20 business entity of unknown form, NDEX  
WEST, LLC, a business entity of  
unknown form, and DOES 1-100,  
inclusive.

#### Defendants.

Case No. SACV13-01526 CJC (RZx)

**NOTICE OF MOTION AND  
MOTION OF DEFENDANT WELLS  
FARGO BANK, N.A. TO DISMISS  
COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Date: November 4, 2013

Date: November  
Time: 1:30 p.m.

Crtrm.: 9B

Judge: Hon. Cormac J. Carney

Complaint Filed: August 26, 2013  
Trial Date: None Set

1       **PLEASE TAKE NOTICE** that at 1:30 p.m. on November 4, 2013, in  
2 Courtroom 9B of the above entitled Court, located at 411 West Fourth Street,  
3 Santa Ana, California 92701, Defendant Wells Fargo Bank, N.A., erroneously sued  
4 as Wells Fargo Home Mortgage ("Wells Fargo"), will move to dismiss each Claim  
5 for Relief in Plaintiff's Complaint with prejudice.

6       This motion is brought pursuant to Federal Rules of Civil Procedure 12(b)(6)  
7 and 9(b) on the grounds that Plaintiff fails to: (1) state facts sufficient to support a  
8 claim on which relief may be granted and (2) plead his claims with the requisite  
9 specificity.

10      The Motion to Dismiss is based on this Notice of Motion and Motion, the  
11 Memorandum of Points and Authorities attached herein, the Request for Judicial  
12 Notice filed concurrently herewith, and such other evidence and arguments as may  
13 be presented at the hearing on this matter.

14      **Procedural Requirements:** If you oppose this Motion, you are required to  
15 file your written opposition with the Office of the Clerk, United States District  
16 Court, 411 West Fourth Street, Santa Ana, California 92701 and serve the same on  
17 the undersigned not later than twenty-one (21) calendar days prior to the hearing. IF  
18 YOU FAIL TO FILE AND SERVE A WRITTEN OPPOSITION by the above date,  
19 the Court may grant the requested relief without further notice.

20      This Motion is made following a conference of counsel pursuant to L.R. 7-3  
21 which took place on September 30, 2013.

22 Dated: October 4, 2013

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

23

24

By: /s/ Josi Kennon Swonetz  
JOSI KENNON SWONETZ  
Attorneys for Defendant  
WELLS FARGO BANK, N.A.

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

This is yet another strike suit in the wake of the real estate market downturn attempting to hold up a mortgage lender who did nothing wrong. After living in his \$2 million estate rent and mortgage free for over a year, Plaintiff J. Chris Walsh, as an individual and as trustee of the JCW Separate Property Trust dated July 28, 2003 (collectively, "Walsh" or "Plaintiff"), filed this lawsuit in a last-ditch effort to avoid a lawful foreclosure sale. Walsh's Complaint generally asserts that Wells Fargo violated California Civil Code Sections 2923.6 and 2923.55,<sup>1</sup> part of the California Homeowner Bill of Rights ("HBOR"), by failing to properly assess/reassess his financial circumstances and explore foreclosure prevention alternatives. The Complaint also alleges that Wells Fargo had a practice of marking-up services provided by third party vendors in violation of Business and Professions Code § 17200 ("UCL"). The Complaint fails to state a claim for multiple reasons.

15        *First*, the Home Owners' Loan Act of 1933 ("HOLA") preempts all of  
16 Walsh's claims because they attack a federally chartered bank's terms of credit,  
17 servicing policies, disclosures and loan-related fees. *Gorton v. Wells Fargo Bank*  
18 NA, 2013 U.S. Dist. LEXIS 86006, \*15-16 (C.D. Cal. Nov. 27, 2012) (holding that  
19 HOLA preempts the precise claims that Walsh attempts to advance here). The  
20 Court should end its analysis there – the Complaint should be dismissed with  
21 prejudice.

22       ***Second***, Walsh does not state a claim under Section 2923.55 because he  
23 concedes he communicated with Wells Fargo regarding foreclosure alternatives.  
24 *Clark v. Wachovia Mortg.*, 2011 U.S. Dist. LEXIS 63398, \*8 (C.D. Cal. June 9,  
25 2011) (Section 2923.5 claim fails as a matter of law where the complaint admits the  
26 borrower communicated with his lender regarding a loan modification).

<sup>28</sup> <sup>1</sup> All further references to "Section" are to the California Civil Code unless otherwise specified.

1       **Third**, Walsh's Section 2923.6 claim fails because: (1) the allegations in the  
 2 Complaint refute his conclusory assertion that he was not afforded a fair opportunity  
 3 to be evaluated for a loan modification; (2) Walsh fails to assert that he complied  
 4 with Section 2923.6(g)'s requirements in describing the purported material change in  
 5 his financial circumstances; (3) HBOR does not apply retroactively; and (4) as a  
 6 party to the settlement agreement in *United States of America v. Bank of America*  
 7 *Corporation*, Case No. 1:12-cv-00361 RMC ("Settlement Agreement"), Wells Fargo  
 8 cannot be held liable for claims under the HBOR so long as it acted in compliance  
 9 with the terms of the Settlement Agreement, and Walsh does not allege any such  
 10 noncompliance. *Ware v. Bayview Loan Serv., LLC*, 2013 U.S. Dist. LEXIS 120324,  
 11 \*9-10 (S.D. Cal. Aug. 16, 2013) (rejecting near identical Section 2923.6 claim  
 12 brought by Walsh's counsel).

13       **Fourth**, Walsh lacks standing to bring his UCL claim because he does not  
 14 allege that Wells Fargo "marked-up" any default related fees in connection with *his*  
 15 loan and therefore fails to allege the "loss of money or property" as the UCL  
 16 requires. Walsh cannot cure this default by amendment because he has not paid any  
 17 of those fees and, therefore, has not "lost money or property" as a result of the  
 18 allegedly unlawful act. At a minimum, the Court should dismiss Walsh's UCL  
 19 claim because Walsh does not plead it with the particularity that Rule 9(b) requires.

20       **Finally**, Walsh's accounting claim fails because Walsh fails to allege facts  
 21 demonstrating that Wells Fargo owed him a fiduciary duty. Moreover, Walsh fails  
 22 to state an underlying claim to which his accounting claim may be tethered.

23       Viewed from any angle, Walsh does not and cannot state a claim for relief.  
 24 The Court should dismiss the Complaint *with prejudice*.

25 **II. FACTUAL ALLEGATIONS AND FACTS JUDICIALLY  
 26 NOTICEABLE**

27       On or about April 8, 2008, Walsh borrowed \$2,000,000 from Wachovia  
 28 Mortgage, FSB ("Wachovia"). (Compl. ¶ 41; Request for Judicial Notice ("RJN"),

1 Ex. 1.) That loan was evidenced by a Promissory Note and secured by a Deed of  
 2 Trust recorded against the property commonly known as 32451 Seven Seas Drive,  
 3 Dana Point, California 92629 ("Property").<sup>2</sup> (*Id.*)

4       Walsh alleges that he "performed dutifully under the Loan, as required, until  
 5 2012, when his payments increased from \$6,800 to \$12,389 per month, and his  
 6 income had decreased, and accordingly, suffered a significant financial setback."  
 7 (Compl. ¶ 42.) By 2013, "Plaintiff's financial situation continued to worsen" and  
 8 eventually he stopped making his monthly mortgage payments. (*Id.* at ¶ 43.)

9       In March 2012, Walsh contacted Wells Fargo to inquire regarding a loan  
 10 modification or other mortgage assistance. (*Id.* at ¶ 44.) Walsh alleges he was told  
 11 that he "'pre-qualified' for a loan modification and promised that if [he] submitted a  
 12 complete application for a loan modification, with all the required financial  
 13 documents . . . then no foreclosure proceedings would initiate while his application  
 14 was in review." (*Id.* at ¶ 44.) Walsh further alleges he submitted a complete loan  
 15 modification, but was advised in February 2013, that he needed to reapply for a loan  
 16 modification with updated financial information. (*Id.* at ¶¶ 45- 47.) Walsh asserts  
 17 he resubmitted the requested documentation. (*Id.* at ¶ 48.) On or around July 31,  
 18 2013, a notice of default was recorded against the Property and sent to Walsh  
 19 evidencing that he owed over \$200,000 in arrears. (*Id.* at ¶ 49; RJN, Ex. 4.)

20       Walsh alleges sometime between February 2013, the date of his latest loan  
 21 modification application, and August 2013, there was a "material change" in his  
 22 financial circumstances. (*Id.* at ¶ 54.) Walsh alleges that on August 26, 2013, his  
 23 attorney sent Wells Fargo a letter that "memorialized and submitted facts regarding  
 24 Plaintiffs' [sic] financial changes[.]" (*Id.* at ¶ 56; Ex. B.) While the letter alleges  
 25  
 26

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27       <sup>2</sup> Effective December 31, 2007, Wachovia was charted as a federal saving bank.  
 28 (RJN, Ex. 2.) On November 1, 2009, Wachovia changed its name to Wells  
 Fargo Bank Southwest, N.A. and then merged into and became a division of  
 Wells Fargo. (RJN, Ex. 3.)

1 Walsh had a "material change of financial circumstances," it did not provide any  
 2 documentation evidencing such change. (Compl., Ex. B.)

3       Walsh responded to the pending foreclosure sale by filing this lawsuit, which  
 4 purports to allege the following claims against Wells Fargo: (1) violation of  
 5 Section 2923.55; (2) violation of Section 2923.6; (3) violation of UCL; and  
 6 (4) accounting. As set forth herein, he fails to state a single viable claim.

7 **III. ANALYSIS**

8       **A. HOLA Preempts Walsh's Claims**

9       In each of his claims for relief, Walsh seeks to use state law to effectively  
 10 regulate Wells Fargo's "terms of credit, . . . including the circumstances under which  
 11 a loan may be called due and payable upon the passage of time or specified event  
 12 external to the loan," "servicing, sale or purchase of, or investment or participation  
 13 in, mortgages," and loan related fees. 12 C.F.R. § 560.2(b)(4), (5), & (10). Thus,  
 14 HOLA preempts his claims.

15       **1. HOLA Preempts Facially Neutral State Laws That, As**  
 16                   **Applied, Would Regulate The Lending Activities Of A**  
 17                   **Federal Savings Bank.**

18       Congress enacted HOLA with the purpose of chartering savings associations  
 19 that are "centrally regulated according to nationwide 'best practices'" under federal  
 20 law. *Nguyen v. Wells Fargo Bank, N.A.*, 749 F.Supp.2d 1022, 1031 (N.D. Cal.  
 21 2010) (citing *Silvas v. E\*trade Mortg. Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008).).  
 22 "Through HOLA, Congress gave the [Office of Thrift Supervision ("OTS")] broad  
 23 authority to issue regulations governing federal savings associations." *Id.* (citing  
 24 12 U.S.C. § 1464; *Silvas*, 514 F.3d at 1005). In exercising that broad authority, the  
 25 OTS "occupies the entire field of lending regulation for federal savings  
 26 associations." 12 C.F.R. § 560.2. "Thus, the federal regulation is intended to  
 27 preempt all state laws purporting to regulate any aspect of the lending operations of  
 28 a federally chartered savings association, whether or not OTS has adopted a

1 regulation governing the precise subject of the state provision." *Lopez v. World*  
 2 *Savs. and Loan Ass'n*, 105 Cal.App.4th 729, 738 (2003). Particularly relevant here,  
 3 HOLA preempts, without limitation, state laws purporting to impose requirements  
 4 regarding:

5 (4) the terms of credit, including amortization of loans and  
 6 the deferral and capitalization of interest and adjustments  
 7 to the interest rate, balance, payments due, or term to  
 8 maturity of the loan, including the circumstances under  
 9 which a loan may be called due and payable upon the  
 10 passage of time or a specified event external to the loan  
 11 . . .

12 (5) loan-related fees, including without limitation, initial  
 13 charges, late charges, prepayment penalties, servicing fees,  
 14 and overlimit fees . . .

15 (9) and advertising, including laws requiring specific  
 16 statements, information, or other content to be included in  
 17 credit application forms, credit solicitations, billing  
 18 statements, credit contracts, or other credit-related  
 19 documents and laws requiring creditors to supply copies of  
 20 credit reports to borrowers or applicants . . .

21 (10) Processing, origination, servicing, sale or purchase of,  
 22 or investment or participation in, mortgages . . .

23 12 C.F.R. § 560.2(b).

24 **2. HOLA Preemption Applies To Wells Fargo's Lending Activities.**

25 Walsh obtained the Loan from Wachovia. (RJN, Ex. 1.) At the time Walsh  
 26 obtained the Loan, Wachovia was a federally chartered savings bank regulated by  
 27 OTS. (RJN, Ex. 2.) Thus, HOLA applies to Walsh's claims arising out of the  
 28 servicing of the Loan.

29 Wells Fargo's acquisition of Wachovia does not change this conclusion.  
 30 "Although Wachovia was subsequently acquired by a national banking association,  
 31 namely Wells Fargo Bank, N.A., district courts have held that HOLA preemption  
 32 applies to all conduct related to the loan." *Sato v. Wachovia Mortg.*, FSB, 2011 U.S.  
 33 Dist. LEXIS 75418, \*14-15 (N.D. Cal. July 13, 2011); *Babb v. Wachovia Mortg.*,  
 34 FSB, 2013 U.S. Dist. LEXIS 106228, \*11 (C.D. Cal. July 26, 2013) ("The fact that

1 Wachovia merged into Wells Fargo does not render HOLA inapplicable. Courts  
 2 have held that successors in interest may properly assert preemption under HOLA  
 3 even if the successor entity is not a federally chartered savings."); *Aguirre v.*  
 4 *Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 131556, \*25 (C.D. Cal. Sept. 11,  
 5 2013) ("[A]lthough Wells Fargo itself is not subject to HOLA and OTS regulations,  
 6 this action is nonetheless governed by HOLA because Plaintiff's loan originated  
 7 with a federal savings bank and was therefore subject to the requirements set forth in  
 8 HOLA and OTS regulations."); *Appling v. Wachovia Mortg., FSB*, 745 F.Supp.2d  
 9 961, 971 (N.D. Cal. 2010).<sup>3</sup> In addition, the Deed of Trust singed by Walsh  
 10 expressly states that such documents are "governed by and construed under federal  
 11 law and federal rules and regulations, including those for federally chartered savings  
 12 institutions." (RJN, Ex. 1 at ¶ 15.)

13           **3. HOLA Preempts Walsh's Claims Because They Attack**  
 14           **Wells Fargo's Servicing Practices, Disclosures, And Terms**  
 15           **Of Credit.**

16       Walsh's Complaint boils down to three primary legal theories:  
 17 (1) Wells Fargo violated Section 2923.55 by failing to disclose foreclosure  
 18 alternatives; (2) Wells Fargo violated Section 2923.6 by failing to afford Walsh a  
 19 fair opportunity to be evaluated for a loan modification; and (3) Wells Fargo  
 20 charged excessive fees for default-related services. (*See* Compl. ¶¶ 25 -35, 77-92,  
 21 94-106.) HOLA preempts each of these claims.

22       *First*, HOLA preempts Walsh's Section 2923.55 claim because that state law,  
 23 on its face, attempts to regulate Wells Fargo's loan related "disclosures" and  
 24 "servicing" in violation of 12 C.F.R. § 560.2(b)(9)-(10). The courts that have  
 25

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26       <sup>3</sup> "In any event, it is likely preemption under the [National Bank Act] would lead  
 27 to the same result" because the analysis under HOLA and National Bank Act  
 28 preemption is essentially the same. *Sato*, 2011 U.S. Dist. LEXIS 75418, \*14,  
 citing *Zlotnik v. U.S. Bancorp*, 2009 U.S. Dist. LEXIS 119857, \*19 (N.D. Cal.  
 Dec. 22, 2009).

1 addressed the question of whether HOLA preempts the current iteration of  
 2 Section 2923.55 confirm this conclusion. *See, e.g., Marquez v. Wells Fargo Bank,*  
 3 N.A., 2013 U.S. Dist. LEXIS 131364 \*14 (N.D. Cal. Sep. 13, 2013) (relying on  
 4 Section 2923.5 cases and determining HOLA also preempts claims under  
 5 Section 2923.55). And the cases holding that HOLA preempted Section 2923.55's  
 6 predecessor are legion. *Nguyen*, 749 F.Supp.2d at 1033 (granting motion to dismiss  
 7 section 2923.5 claim because HOLA preempts an attempt to apply that statute to  
 8 Wells Fargo); *Gorton*, 2013 U.S. Dist. LEXIS 86006 at \*15-16 ("[D]istrict courts in  
 9 California routinely find that § 2923.5 claims are preempted by HOLA."); *Aguirre v.*  
 10 *Wells Fargo Bank NA*, 2013 U.S. Dist. LEXIS 131556, \*26 (C.D. Cal. Sept. 11,  
 11 2013); *Mata v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 108197, \*13-14  
 12 (C.D. Cal. July 31, 2013) ("[S]ection 2923.5 attempts to regulate federal loan  
 13 servicing activities. This is precisely the type of activity HOLA preempts.");  
 14 *Gonzalez v. Alliance Bancorp*, 2010 U.S. Dist. LEXIS 47943, \*16 (N.D. Cal.  
 15 April 19, 2010) ("defendants have made a compelling showing that section 2923.5 is  
 16 preempted"); *Sato*, 2011 U.S. Dist. LEXIS 75418, \*16 ("[T]he overwhelming  
 17 weight of authority has held that a claim under section 2923.5 is preempted by  
 18 HOLA.") (quoting *Tanguinod v. World Savings Bank*, 755 F.Supp.2d 1064, 1074  
 19 (C.D. Cal. 2010)). This Court should follow the "overwhelming weight of authority  
 20 that has held that a claim under section 2923.5 is preempted by HOLA" and dismiss  
 21 Walsh's Section 2923.55 claim with prejudice. *Sato*, 2011 U.S. Dist. LEXIS 75418,  
 22 \*16.

23       **Second**, HOLA preempts Walsh's claim for violation of Section 2923.6  
 24 because, on its face, that statute purports to regulate Wells Fargo's lending practices  
 25 by requiring the bank to consider modifying Walsh's loan and by impairing  
 26 Wells Fargo's ability to enforce its security interest in the Property unless it makes  
 27 certain disclosures. 12 C.F.R. § 560.2(b)(4) & (10); *Gorton*, 2013 U.S. Dist. LEXIS  
 28 86006 at \*10-11; *Kaplan v. Wells Fargo N.A.*, 2013 U.S. Dist. LEXIS 109023, \*9

1 (C.D. Cal. July 30, 2013); *Marquez*, 2013 U.S. Dist. LEXIS 131364 at \*14 (granting  
 2 motion to dismiss because HOLA preempts Section 2923.6.).

3 Judge Selna's decision in *Gorton v. Wells Fargo Bank, N.A.*, is dispositive.  
 4 There, the court held that HOLA preempted the precise Section 2923.6 claim Walsh  
 5 seeks to advance. *Gorton*, 2013 U.S. Dist. LEXIS 86006 at \*10-11. In so deciding,  
 6 the *Gorton* court began by noting that HBOR seeks to impose liability "based solely  
 7 on communication regarding and actions or omissions related to either the Plaintiff's  
 8 application for loan modification, Wells Fargo's denial of that application, or  
 9 Plaintiff's appeal of the denial." *Gorton*, 2013 U.S. Dist. LEXIS 86006 at \*10-11.  
 10 Thus, the *Gorton* court concluded that the plaintiff's HBOR claims fell "within the  
 11 preemptive scope of § 560.2(b)(4), which applies to 'state laws purporting to impose  
 12 requirements regarding . . . (4) the terms of credit, . . . including the circumstances  
 13 under which a loan may be called due and payable upon the passage of time or  
 14 specified event external to the loan.'" *Id.* at \*11. Judge Selna went on to hold that,  
 15 even if the plaintiff's claims did not fall within the confines of 12 C.F.R.  
 16 § 560.2(b)(4), "the Court would have no difficulty concluding that the law 'affects  
 17 lending' and that it is not otherwise saved from preemption by any subsection  
 18 (c) category." *Id.*

19 *Gorton* is directly on point. Here, as in that case, Plaintiff's 2923.6 claim  
 20 attempts to use state law to regulate Wells Fargo's terms of credit, servicing, and  
 21 processing of his loan. Accordingly, HOLA preempts it.

22 **Third**, HOLA preempts Walsh's UCL claim because it attacks Wells Fargo's  
 23 loan-related fees. 12 C.F.R. § 560.2(b)(5); *Sami v. Wells Fargo Bank*, 2012 U.S.  
 24 Dist. LEXIS 38466, \*27 (N.D. Cal. March 21, 2012) ("HOLA explicitly preempts  
 25 any state law affecting the "processing . . . [of] mortgages" and any state law  
 26 affecting '[l]oan related fees, including . . . late charges . . . and overlimit fees.'");  
 27  
 28

1 *Marquez*, 2013 U.S. Dist. LEXIS 131364 at \*17-19 (HOLA preempts claims  
 2 attacking default-related fees).<sup>4</sup>

3       ***Fourth***, Walsh's accounting claim is preempted because it attacks  
 4 Wells Fargo's disclosures and servicing practices. *Ulu v. Wells Fargo Bank N.A.*,  
 5 2011 U.S. Dist. LEXIS 141992, \*13-14 (N.D. Cal. Dec. 9, 2011) ("Plaintiffs' third  
 6 cause of action for an accounting challenges WFB's disclosure, as well as its  
 7 servicing practices, by alleging that Plaintiffs cannot ascertain the true amount owed  
 8 on the note without an accounting. This claim is preempted by HOLA."); *Flowers v.*  
 9 *Wells Fargo Bank, N.A.*, 2011 U.S. Dist. LEXIS 75429, \*14 (N.D. Cal. July 13,  
 10 2011) (same). This claim also fails because it is derivative of Walsh's other  
 11 preempted claims, and is thus preempted for the same reasons.

12       **B.      Walsh's Claims For Relief Suffer From Additional Fatal Flaws.**

13           **1.      Walsh's Section 2923.55 Claim Fails.**

14       Walsh alleges Wells Fargo violated Section 2923.55 by "failing to contact  
 15 Plaintiffs to assess their [sic] financial situation and explore possible alternatives to  
 16 foreclosure, by failing to advise Plaintiffs [sic] of their [sic] right to request a  
 17 meeting within fourteen (14) days to evaluate their [sic] financial situation, and by  
 18 failing to provide Plaintiffs [sic] with the telephone number to find a HUD-certified  
 19 counseling agency." (Compl. ¶ 69.) Even if HOLA did not preempt this claim, it  
 20 would still fail as a matter of law because Walsh's specific allegations establish that  
 21 Wells Fargo contacted him regarding foreclosure alternatives (*i.e.*, a loan  
 22 modification) throughout 2012 and 2013. (*See generally*, Compl. ¶¶ 44-49.).

23       In *Clark v. Wachovia Mortg.*, this Court rejected Walsh's counsel's attempt to  
 24 advance the same theories at issue here on the ground that the plaintiff's allegations  
 25 appeared to "contradict her assertion that Wachovia did not comply with its

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26  
 27  
 28       <sup>4</sup> To the extent Walsh's UCL claim relies on the Complaint's preempted HBOR  
      claims, HOLA still preempts it. *Silvas*, 514 F.3d at 1004 (HOLA preempted  
      UCL claim that was derivative of preempted state law).

1 obligation to contact her regarding her options to avoid foreclosure because she  
 2 alleges that she provided documents to Wachovia as requested and Wachovia  
 3 represented to the plaintiff that she was being reviewed for a loan modification  
 4 under the HAMP program." 2011 U.S. Dist. LEXIS 63398 at \*8. Multiple other  
 5 courts have reached the same conclusion and dismissed similar foreclosure  
 6 avoidance actions at the pleadings stage. *Derousseau v. Bank of Am., N.A.*, 2012 U.S.  
 7 Dist. LEXIS 42901, \*21 (S.D. Cal. March 28, 2012) (concluding that defendants  
 8 complied with Section 2923.5 where they "engaged in lengthy modification efforts"  
 9 before recording the notice of default); *Davenport v. Litton Loan Serv., LP*,  
 10 725 F.Supp.2d 862, 877 (N.D. Cal. 2010) (dismissing Section 2923.5 claim because  
 11 plaintiffs' allegation of loan modification discussions with the lender negated a  
 12 claim that Section 2923.5 had been violated); *Mueller v. Bank of Am., N.A.*, 2012  
 13 U.S. Dist. LEXIS 107684, \*21-22 (S.D. Cal. Aug. 1, 2012) (dismissing plaintiff's  
 14 Section 2923.5 claim where the lender engaged in extensive loan modification  
 15 negotiations with the plaintiff); *Brown v. U.S. Bancorp*, 2012 U.S. Dist. LEXIS  
 16 26226, \*18-19 (C.D. Cal. Feb. 27, 2012) ("Because plaintiffs admit that they  
 17 discussed loan modifications with [the lender] well before the notice of default was  
 18 recorded, their allegation that defendants failed to comply with § 2923.5 fails.")

19 Here, as in *Clark*, the allegations in the Complaint directly contradict Walsh's  
 20 assertion that Wells Fargo failed to comply with the requirements under  
 21 Section 2923.55. Among other things, Walsh concedes he was engaged in loan  
 22 negotiations to modify his loan from March 2012 to July 2013. (Compl. ¶¶ 44-49.)  
 23 Throughout that time period, Walsh alleges he was in direct contact with  
 24 Wells Fargo, he provided documents to Wells Fargo as requested, and he was  
 25 advised by a Wells Fargo's representative that he "pre-qualified" for a loan  
 26 modification. (*Id.*) Walsh's conclusory allegations that Wells Fargo failed to  
 27 comply with Section 2923.55 cannot withstand these admissions.

28

Moreover, the declaration attached to the Notice of Default demonstrates Wells Fargo complied with the requirements under Section 2923.55. Specifically, the declaration states, "[t]he mortgage servicer has contacted the borrower pursuant to California Civil Code § 2923.55(b)(2) to 'assess the borrower's financial situation and explore options for the borrower to avoid foreclosure'. Thirty (30) days, or more, have passed since the initial contact was made." As this Court acknowledged, in *Cabanilla v. Wachovia Mortg.*, 2012 U.S. Dist. LEXIS 39270 (C.D. Cal. March 20, 2012), "the declaration is sufficient to establish that [Wells Fargo] has met its obligations" under the statute. *Id.* at \*12. Walsh's conclusory allegations that the declaration is false is not sufficient to support his claim. *Kamp v. Aurora Loan Servs.*, 2009 U.S. Dist. LEXIS 95245, \*6-7 (C.D. Cal. Oct. 1, 2009) ("Moreover, the Kamps' claim fails because their conclusory assertions are contradicted by the notice of default attached as Exhibit A, which includes the declaration required by § 2923.5.").

## **2. Walsh's Section 2923.6 Claim Fails.**

Walsh's Section 2923.6 claim also fails for additional independent reasons.

### **(a) Walsh Does Not Allege The Elements Of A Section 2923.6 Claim.**

The crux of Walsh's Section 2923.6 claim is that he was "never afforded a fair opportunity to be evaluated, and were [sic] never fairly evaluated for a foreclosure prevention alternative." (Compl. ¶ 55.) Specifically, Walsh alleges he "attempted, several times, to contact their [sic] mortgage servicer to inquire as to their [sic] options to avoid foreclosure; however, Plaintiffs [sic] were told that the servicers would not assist Plaintiff with their [sic] mortgage, and that Plaintiffs' [sic] only option was to pay the default on the Loan." (*Id.*) Walsh further alleges there has been a "material change" in his financial circumstances which requires Wells Fargo to reevaluate him for a modification. (Compl. ¶¶ 96-99.) Walsh does not plead the elements of his Section 2923.6 claim.

At its threshold, this claim fails because, again, Walsh's allegations belie his conclusory claim of a HBOR violation. Specifically, Walsh admits that Wells Fargo considered him for a loan modification in March 2012 and again in February 2013. (Compl. ¶¶ 44, 47.) Walsh further concedes that, when he contacted Wells Fargo regarding a loan modification, the bank prompted him to submit a completed loan application, which it reviewed. (Compl. ¶¶ 44-45.) These specific admissions defeat Walsh's general assertion that Wells Fargo never fairly evaluated him for a loan modification and, in turn, doom his Section 2923.6 claim.

Walsh's allegations that he "notified" Wells Fargo of a material change in his "financial circumstances" does nothing to salvage his inherently defective Section 2923.6 claim. Courts have found that letters drafted by Walsh's counsel nearly identical to the one on which Walsh relies upon here fail to trigger a bank's obligation to reconsider a borrower for a modification because they do not comply with the requirements of Section 2923.6(g). For example, in *Ware v. Bayview Loan Serv., LLC*, 2013 U.S. Dist. LEXIS 120324 (S.D. Cal. Aug. 16, 2013), the court determined that essentially the same letter from Walsh's counsel could not support a Section 2923.6 claim because "Plaintiffs' barebone letter does not satisfy the requirement of § 2923.6(g), which requires the borrower to 'document' and 'submit' a material change in circumstances . . . Plaintiffs' letter is bereft of any details or documentation." *Id.* at \*9-10. The *Ware* court went on to hold "that to accept the letter as a valid notice of material change would be at odds with the very purpose of subsection (g), which is meant to relieve mortgage servicers from evaluating multiple loan modification applications submitted for the purpose of delay." *Id.* at \*10. The court in *Winterbower v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 44087 (C.D. Cal. March 27, 2013), reached the same conclusion with regards to a letter submitted in that case by Walsh's counsel. *Id.* at \*9 ("[S]uch a barebone description would easily sidestep the entire purpose of subsection(g), which is meant

28

1 to relieve mortgage servicers from evaluating multiple loan modification  
2 applications submitted for the purpose of delay.").

The letters that the *Ware* and *Winterbower* courts found could not support a Section 2923.6 claim differ in no material respect from the letter at issue here. Walsh's counsel drafted all the letters and they were all devoid of facts detailing the purported material change. For instance, Walsh's letter fails to allege facts detailing the amount of the "substantial salary," when he began receiving this "substantial salary," and how it materially changed his financial circumstances since the borrower's last application. The letters also all failed to provide any documentation substantiating the borrower's claim of changed circumstances. Justly, the express language of Section 2923.6(g) requires more.

Even if the demand letter did satisfy the requirements under Section 2923.6(g), which it does not, this claim would still fail because the Complaint is devoid of facts showing Walsh suffered an "injury in fact." *Lujan v. Defenders of Wild Life*, 504 U.S. 555, 560 (1992) ("[A]n injury in fact, meaning an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical.") (internal quotations omitted). Walsh filed this action the same day his counsel informed Wells Fargo of the purported "material change" in his financial circumstances. (See Compl. Ex. B.) As a result, Wells Fargo was not given an opportunity to evaluate the loan modification request that forms the basis of Walsh's Section 2923.6(g) claim. Therefore, that the bank's alleged inaction could not have caused the harm of which Walsh complains.

**(a) HBOR Is Not Retroactive.**

25 The HBOR does not apply retroactively. *McGough v. Wells Fargo*  
26 *Bank, N.A.*, 2012 U.S. Dist. LEXIS 151737, \*16, n. 4 (N.D. Cal. Oct. 22, 2012)  
27 ("The Court notes that the ... [HBOR] amendments do not go into effect until Jan. 1,  
28 2013 and there is no indication that the law is intended to be, or will be, applied

1 *retroactively.*") (emphasis in orig.). By Plaintiff's own admission, the dual-tracking  
 2 prohibition of HBOR did not become effective until January 1, 2013. (Compl.  
 3 ¶ 15.) Thus, to the extent Walsh bases his claim on allegations regarding his  
 4 purported loan modification negotiations with Wells Fargo prior to January 1, 2013,  
 5 this claim fails.

6                             (b) Walsh Does Not Allege That Wells Fargo Failed To  
 7 Comply With The Settlement Agreement.

8                             Finally, this claim fails because, as a party to the Settlement Agreement,  
 9 Wells Fargo cannot be held liable for violations of HBOR so long as it complies  
 10 with the Settlement Agreement. (*See* RJN, Ex. 5.) Section 2924.12 provides:

11                             A signatory of a consent judgment entered in the case  
 12 entitled United States of America et al. v. Bank of  
 13 America Corporation et al. filed in the United States  
 14 District Court for the District of Columbia, case number  
 15 1:12-cv-00361 RMC, that is in compliance with the  
 16 relevant terms of the Settlement Term Sheet of that  
 17 consent judgment with respect to the borrower who  
 18 brought an action pursuant to this section while the  
 19 consent judgment is in effect shall have no liability for a  
 20 violation of Section . . . 2933.6[.]

21                             Cal. Civ. Code § 2924.12(g).

22                             Wells Fargo was a signatory of the consent judgment. *See Winterbower*,  
 23 2013 U.S. Dist. LEXIS 44087 at \*10 ("By California Civil Code Section 2924.12,  
 24 which explains a homeowner's injunctive remedies under the Homeowner Bill of  
 25 Rights, a signatory to that settlement 'shall have no liability for a violation of  
 26 Section . . . 2923.6' so long as the signatory is in compliance with the relevant terms  
 27 from the Settlement Term Sheet. Plaintiffs make no such allegations as to a lack of  
 28 compliance with the settlement."). Yet Walsh does not assert that Wells Fargo  
 failed to comply with the terms of that Settlement Agreement. His claim fails for  
 this reason as well. *Id.*

1                   3.     Walsh's UCL Claim Fails.

2                 Walsh alleges Wells Fargo violated Business and Professions Code § 17200  
 3 ("UCL") by: (1) "[r]ecording a Notice of Default with a false and defective  
 4 Declaration of Compliance;" (2) "[f]ailing to sufficiently contact Plaintiffs [sic] and  
 5 assess Plaintiffs' [sic] financial situation . . . prior to recording the NOD;"  
 6 (3) [r]ecording a Notice of Default and proceeding with conducting a Trustee's sale  
 7 without complying with Civil Code § 2923.6;" and (4) "induc[ing] Plaintiffs [sic] to  
 8 pay marked-up and/or unnecessary fees for default-related services." (Compl.  
 9 ¶¶ 112, 114.) This claim fails for several reasons beyond preemption.

10                 To the extent Walsh's UCL claim relies on Wells Fargo's alleged failure to  
 11 comply with the HBOR, the court should dismiss it for the reasons set forth above.  
 12 See *Farmers Ins. Exchange v. Sup. Ct.*, 2 Cal.4th 377, 383 (1992) (claim under UCL  
 13 must be founded on properly pled violation of separate law); *Singh v. Wells Fargo*  
 14 *Bank, N.A.*, 2009 U.S. Dist. LEXIS 67123, \*16 (N.D. Cal. July 30, 2009).

15                 Further, Walsh lacks standing to bring his UCL claim because he does not  
 16 allege that Wells Fargo's supposedly practice of charging excessive fees caused him  
 17 to suffer any "loss of money or property." Cal. Bus. & Prof. Code § 17200  
 18 (following Proposition 64, requiring that a plaintiff have suffered loss of money or  
 19 property as a result of the alleged unlawful act); *Daro v. Super. Ct.*, 151 Cal.App.4th  
 20 1079, 1099 (2007) (dismissing claim under Unfair Competition Law; plaintiff must  
 21 demonstrate a "causal connection between the harm suffered and the unlawful  
 22 activity"); *In re Firearms Cases*, 126 Cal.App.4th 959, 981 (2005) (UCL claim may  
 23 not "be established without a link between a defendant's business practice and the  
 24 alleged harm"). Walsh does not allege that Wells Fargo charged him, or that he  
 25 paid, any excessive fees. Walsh cannot amend to cure this defect because he  
 26 concedes that he stopped making his loan payments in 2012 and, therefore, could  
 27 not have paid any of the vague "fees" he seeks to challenge. (Compl. ¶ 43.)

28

Finally, Walsh fails to plead his claim with the requisite particularity. Fed.R.Civ.P. 9. *See also Nguyen*, 749 F.Supp.2d at 1037-38; *Khoury v. Maly's of Cal., Inc.*, 14 Cal.App.4th 612, 619 (1993) ("A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation."). In *Rosenfeld v. Nationstar Mortg., LLC*, 2013 U.S. Dist. LEXIS 118161 (C.D. Cal. Aug. 19, 2013), Judge Snyder rejected Walsh's counsel's attempt to assert identical claims regarding excessive fees. In that case, the plaintiff alleged the lender, Nationstar, engaged in the general practice of "marking up the costs of defaultrelated [sic] services provided by third parties, and passing the extra cost on to the consumer." *Id.* at \*15. In dismissing the plaintiff's UCL claim, the court found that the "allegations [were] not sufficiently specific to 'give defendant notice of the particular misconduct[.]'" *Id.*

As in *Rosenfeld*, Walsh alleges Wells Fargo marked up defaulted-related services provided by third-party vendors and passed those costs onto its borrowers. (Compl. ¶¶ 25-35.) Walsh, however, fails to allege any facts demonstrating that Wells Fargo marked-up or charged excessive fees relating to his loan. Nor does Walsh explain what charges allegedly assessed to his loan were excessive and why they were excessive. Walsh's conclusory cut-and-paste allegations fail to plead facts regarding the nature of Wells Fargo's purported misconduct and, thus, cannot support a UCL claim.

#### **4. Walsh's Accounting Claim Fails.**

In his fourth claim for relief, Walsh alleges that he has been making "mortgage payments to Defendants and their successors since 2004" and seeks an accounting of "[t]he actual amount of the arrearages on Plaintiffs' [sic] loan and the actual amount of money due from Plaintiff to Defendants."<sup>5</sup> (Compl. ¶¶ 133, 136.)

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<sup>5</sup> Walsh's allegation that he has been making payments since 2004 directly contradicts the allegations in his complaint and judicially noticeable documents,

1 To state a cause of action for an accounting, a plaintiff must allege: (1) a fiduciary  
 2 relationship; (2) a balance due from the defendant to the plaintiff that can only be  
 3 ascertained by an accounting; and (3) misconduct. *Kritzer v. Lancaster*,  
 4 96 Cal.App.2d 1, 6-7 (1950); *Brea v. McGlashan*, 3 Cal.App.2d 454, 460 (1934).  
 5 Walsh's accounting claim fails for several reasons.

6       Walsh does not state a claim for accounting because he does not allege facts  
 7 showing the existence of a fiduciary relationship. Rather, he asserts that "a fiduciary  
 8 relationship between the parties is not required to state a cause of action for  
 9 accounting. All that is required is that some relationship exist that requires an  
 10 accounting." (Compl. ¶ 129.) That is not the law. *Powell v. Residential Mortg.*  
 11 *Capital*, 2010 U.S. Dist. LEXIS 59698, \*30 (N.D. Cal. May 24, 2010) ("Moreover,  
 12 'an accounting can be a cause of action when a defendant has a fiduciary duty to a  
 13 plaintiff which requires an accounting, and that some balance is due to the plaintiff  
 14 that can only be ascertained by an accounting.'"); *Guerrero v. Wells Fargo Bank*,  
 15 N.A., 2010 U.S. Dist. LEXIS 96261, \*11-12 (C.D. Cal. Sept. 14, 2010) (dismissing  
 16 accounting claim because "a lender does not have a fiduciary relationship as a  
 17 matter of law with its borrowers"); *Ware*, 2013 U.S. Dist. LEXIS 120324, \*14 (S.D.  
 18 Cal. Aug. 16, 2013) ("Finally, Plaintiffs have not established any fiduciary duties  
 19 under which Defendant owed them a detailed accounting."). *Spencer v. DHI Mortg.*  
 20 *Co., LTD.*, 642 F.Supp.2d 1153, 1160-61(E.D. Cal. 2009) ("[a]bsent 'special  
 21 circumstances' a loan transaction 'is at arms-length and there is no fiduciary  
 22 relationship between the borrower and lender.'"). Because the Complaint is devoid  
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25 which demonstrate that Walsh did not enter into the loan contracts until  
 26 April 2008, and stopped making his mortgage payments in 2012. *Sprewell v.*  
*Golden St. Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (rejecting the general  
 27 rule that allegations in a complaint must be accepted as true where those  
 28 allegations contradict exhibits attached to the complaint or judicially noticeable  
 documents).

1 of facts suggesting that Wells Fargo acted as anything but a traditional lender,  
 2 Walsh's accounting claim fails.

3       In addition Walsh's claim fails because his "[a] request for a legal accounting  
 4 must be tethered to relevant actionable claims." *Hafiz v. Greenpoint Mortg.*,  
 5 652 F.Supp.2d 1039, 1043 (N.D. Cal. 2009). Walsh attempts to tether his  
 6 accounting claim to his allegations that Wells Fargo engaged in the practice of  
 7 marking up default-related services fails [Compl. ¶ 130-132], but as explained  
 8 above, Walsh fails to state a claim based on the supposedly excessive fees. Because  
 9 Walsh has "not anchored [his] request to any viable claims' and [his] accounting  
 10 claim cannot survive." *Derusseau v. Bank of Am., N.A.*, 2011 U.S. Dist. LEXIS  
 11 136508,\*24 (S.D. Cal. Nov. 29, 2011).

12     Furthermore, a cause of action for accounting is not proper when it is the  
 13 plaintiff who owes money to the defendant. *Teselle v. McLoughlin*,  
 14 173 Cal.App.4th 156, 179 (1990); *see also Singh v. Wells Fargo Bank, N.A.*,  
 15 2009 U.S. Dist. LEXIS 67123 at \*8-9. Such is the case here. As evidenced by the  
 16 Notice of Default, as of July 30, 2013, Walsh owes Wells Fargo well over \$200,000  
 17 in past due mortgage payments. (RJN, Ex. 4.) Walsh's accounting claim fails for  
 18 this reason as well.

19 **IV. CONCLUSION**

20     Walsh's claims suffer from inherent defects that cannot be cured by  
 21 amendment. The Court should not hesitate to dismiss the Complaint *with prejudice*.

23 Dated: October 4, 2013

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